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No. 06-806

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In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

BILLY D. WILLIAMS, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals and the Director of the Labor Department's Office of Workers' Compensation Programs properly interpreted the statute of limitations to permit a black lung claimant to file a claim more than three years after a misdiagnosis of total disability due to pneumoconiosis which had been legally nullified by the Department's determination that the miner was not, at that earlier time, entitled to an award of black lung benefits.

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STATEMENT OF THE CASE

Respondent Billy D. Williams worked in coal mine employment in West Virginia for 38 years. In July 1995, after retiring, he filed his first claim for black lung benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 et seq. ("the Act"). While the claim was pending, Mr. Williams was examined by Dr. Jerome Lebovitz, who wrote a report concluding that Mr. Williams was totally disabled due to pneumoconiosis. On January 11, 1996, about a month after Mr. Williams received the report from Dr. Lebovitz, the Department of Labor denied his claim for black lung benefits. The Department of Labor notified Mr. Williams that he did not have pneumoconiosis and that he was not totally disabled by the disease. Believing that there was nothing more he could do, Mr. Williams did not appeal. Pet. App. 65a.

By 2001 Mr. Williams' breathing had become worse, and so he filed a second claim for black lung benefits on June 6, 2001. Pet. App. 5a. On this second claim, after having Mr. Williams examined by a physician, the Department of Labor concluded that he was totally disabled due to pneumoconiosis. Petitioner Consolidation Coal Company appealed the decision and argued both that Mr. Williams was not totally disabled due to pneumoconiosis and that his claim was time-barred because of the receipt of Dr. Lebovitz's report six years earlier.

While the case was pending before the Labor Department's Office of Administrative Law Judges, both sides developed medical evidence to support their positions. At the hearing, Mr. Williams moved to strike the report of Dr. Lebovitz from evidence because it was very poorly prepared and substitute in its place a more probative medical report

from Dr. Cohen. Pet. App. 25a-26a, 50a, 66a. On June 1, 2004, Administrative Law Judge Fletcher E. Campbell, Jr. issued a Decision and Order finding Mr. Williams entitled to an award of black lung benefits. Pet. App. 57a-80a. The ALJ reiterated the rulings he had made both at the hearing and in a written order denying Consolidation Coal's renewed motion for summary judgment on April 16, 2004, and again found that Mr. Williams' claim was timely filed. Pet. App. 69a-70a.

Consolidation Coal appealed Judge Campbell's Decision and Order to the Benefits Review Board, which issued a Decision and Order on August 8, 2005 affirming the award of black lung benefits. Pet. App. 30a-55a. The Board unanimously agreed with the ALJ's conclusion that the claim was timely filed. Pet. App. 40a-41a.[1]

The Court of Appeals for the Fourth Circuit unanimously affirmed, thoroughly discussing Consolidation Coal's contention that the claim was untimely. Pet. App. 11a-19a. The Court recognized that since pneumoconiosis is recognized as a "latent and progressive disease", 20 C.F.R. § 718.201(c), the Act provides that a miner may file a subsequent claim after his first claim is denied, if the miner can demonstrate a "material change in circumstances." 20 C.F.R. § 725.309(d). The Court noted that it had extensively considered the appropriate standard for evaluating a miner's subsequent claim after a prior denial of benefits in its *en banc* decision in Lisa Lee Mines v. Director, OWCP, 86 F.3d 1358 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997). Since Lisa Lee Mines is grounded on the principle that a prior

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[1] One Board member dissented on another issue. *See* Pet. App. 55a.

denial of black lung benefits must be accepted as both final and correct, it necessarily follows that a medical determination of total disability due to pneumoconiosis made prior to such denial of benefits was a misdiagnosis:

> For this reason, the DOL's legal determination that Williams was not totally disabled due to coal worker's pneumoconiosis as of January 11, 1996 necessarily refuted Dr. Lebovitz's diagnosis that Williams had contracted the disease by that point. Moreover, because we treat Dr. Lebovitz's diagnosis, for legal purposes, as a misdiagnosis in light of the denial of Williams's first claim, we must necessarily conclude that the (mis) diagnosis had no effect on the statute of limitations for his second claim. Consolidation Coal Co. v. Williams, supra, 453 F.3d at 616. Pet. App. 14a.

Consolidation Coal's petition for rehearing and rehearing *en banc* was denied with no judge voting for rehearing. Pet. App. 1a-2a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT AMONG THE CIRCUITS AND NO CONFLICT WITHIN THE FOURTH CIRCUIT.

A. There Is No Split Among the Circuits.

Consolidation Coal alleges a split within the circuits, claiming that the Sixth Circuit's decision in Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602 (6th Cir. 2001), is contrary to the decision below. Pet. at 6. As we now explain, the statement in Kirk on which petitioner relies was

dicta and has since been repudiated by the Sixth Circuit itself in a decision that recognized the statement as dicta.

In Kirk, the Sixth Circuit said that the black lung statute of limitations expires for all time three years after the first medical determination of total disability due to pneumoconiosis, unless the miner returns to work. 264 F.3d at 608. However, this statement was dicta. The issue decided in Kirk was whether the employer had established, pursuant to 20 C.F.R. § 725.308(c), that statements by doctors more than three years prior to 1992, when the miner filed his fourth black lung application, constituted "medical determination[s]" under 30 U.S.C. § 932(f) and 30 C.F.R. § 308(a). Kirk held that these statements did not constitute "medical determination[s] of total disability due to pneumoconiosis," even though the miner had filed previous claims and, thus, the court found the miner's 1992 application to be timely. The court then went on to note that Tennessee Consolidated Coal "complains that our acceptance of Kirk's claim as timely implies it will never know when its liability for a particular miner will cease, defeating the purpose of a statute of repose." 264 F.3d at 608. This statement was classic dicta, however, as it did not apply to Mr. Kirk's claim which, as noted above, the court found timely.

That Kirk's statement was dicta without binding effect in the Sixth Circuit wholly undermines petitioner's claim of a circuit split. But the claim of a circuit split is even weaker than that. Petitioner has neglected to advise this Court that, after Kirk, the Sixth Circuit issued an unpublished decision in which it decided the statute of limitations issue just as the Fourth Circuit has and for the same reasons. In Peabody Coal Co. v. Director, OWCP (Dukes), 48 Fed. Appx. 140 (6th Cir. 2002), Mr. Dukes filed an application for black lung benefits in 1988, after being advised by doctors that he suffered from

pneumoconiosis. The claim was denied by the Department of Labor, and Mr. Dukes took no further action. He filed a second claim in 1995, which was approved. Peabody Coal Company appealed, claiming that Kirk barred the claim.

The Sixth Circuit rejected the company's contention, holding that when the Department of Labor denies a claim after a medical determination of pneumoconiosis, the medical determination is by definition erroneous, and thus constitutes a misdiagnosis with no effect on the statute of limitations:

> That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes. If he later contracted the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, the statute of repose does not commence until a *proper* medical determination.

48 Fed. Appx. at 146 (emphasis in original).

In reaching this conclusion, the Sixth Circuit considered the statutory language, the Tenth Circuit's decision in Wyoming Fuel Co. v. Director, OWCP, 90 F.3d 1502, 1507 (10th Cir. 1996), the judicial recognition that pneumoconiosis is a progressive disease, and the inherent unfairness of holding a miner responsible for a physician's misdiagnosis of the disease. Id., at 145-146. The Sixth Circuit also considered the contrary language in Kirk. The Court specifically found this language was dicta: "Today, we have carefully considered this issue and hold otherwise." Id. at 147.

The Fourth Circuit understood all of this. It noted that the language in Kirk was dicta that was "disavowed" by the Sixth Circuit itself. Pet. App. 15a n 2; Williams, 453 F.3d at 616 n.2. The Fourth Circuit also recognized that its holding was in agreement with the Tenth Circuit's decision in Wyoming Fuel Co., supra. Hence, there is no conflict among the circuits. The Fourth, Sixth and Tenth Circuits all agree that a (mis)diagnosis of total disability due to pneumoconiosis is nullified for statute of limitations purposes when the Department of Labor subsequently denies the miner's black lung claim.

B. There Is No Conflict Within the Fourth Circuit.

Consolidation Coal also alleges that the Fourth Circuit's decision below is "irreconcilable" with its decision in Island Creek Coal Co. v. Henline, 456 F.3d 421 (4th Cir. 2006). *See* Pet. at 7, 10. The fundamental answer to the company's claim is that an intra-circuit split – assuming that the intra-circuit split is genuine – is not a basis for review by this Court, *see* S. Ct. Rule 10, but rather a reason for the court of appeals to grant en banc review.

In any event, no genuine intra-circuit split exists here, as the Fourth Circuit's unanimous denial of en banc review here strongly suggests. In Henline, the Court rejected an interpretation of 30 U.S.C.§ 932(f) and 30 C.F.R. § 308(a) by the Benefits Review Board that a medical determination of total disability due to pneumoconiosis must be in writing. Agreeing with the Department of Labor's Office of Workers' Compensation Programs, the court held that the Board's requirement of a written notice before the statute of limitations can be triggered was inconsistent with the statute, which does not require that the notice be in writing.

The Fourth Circuit's decision in Henline does not conflict with the decision below. In Henline, the Benefits Review Board had added an element that was nowhere present in the statute. In contrast, the panel decision here represents an interpretation that is consistent with the text of 30 U.S.C. § 932(f) as well as the overall structure and purpose of the black lung compensation program. In both cases, the Court agreed with the Director's reasonable interpretation of the statute.[2]

II. THE DECISION BELOW CORRECTLY INTERPRETS THE STATUTE.

Petitioner argues that the decision below "rewrites the statute," which is "plain and unambiguous." Pet. at 8-10, 14-15. Section 422(f) of the Act, 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits . . . shall be filed within three years after whichever of the following occurs later – (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." The regulation that implements this provision, 20 C.F.R.§ 725.308(a), provides that

> [a] claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of

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[2] We note that Judge Gregory both wrote the decision in Williams and joined in the panel decision in Henline.

> 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

Consolidation Coal argues that the plain meaning of the statute is that once a miner has received a medical determination of total disability due to pneumoconiosis, any and all claims must be filed within three years of that medical determination. For at least three separate reasons, petitioner is wrong.

First, the Fourth Circuit's interpretation of the statute makes sense. As courts have recognized for decades, pneumoconiosis is a latent and progressive disease. *See, e.g.*, Mullins Coal Co. v. Director, OWCP, 484 U.S. 135, 138 (1987); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 7-8 (1976). Six years ago, the Department of Labor amended the regulatory definition of pneumoconiosis so as to provide that "[f]or purposes of this definition, pneumoconiosis is recognized as a latent and progressive disease which may become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c). When criticized by the coal mining industry for proposing this amendment to the regulatory definition of pneumoconiosis, the Department of Labor, in the preamble to the final regulation, published a list of dozens of cases from all circuits, which recognize that pneumoconiosis is a progressive disease. *See* 65 Fed. Reg. 79920, 79971-72 (December 20, 2000).

Since pneumoconiosis is latent and progressive, it may not be diagnosable, or it may not reach the stage of creating disability, until long after the miner has ceased his coal mine employment. During this period of time, the miner may file a premature black long claim, and he may receive an inaccurate medical diagnosis of total disability due to pneumoconiosis. Because of the latent and progressive nature

of the disease, the Department of Labor promulgated 20 C.F.R. § 725.309 to permit the filing of a subsequent claim for benefits after a previous claim is denied.

The panel below reviewed the Fourth Circuit's *en banc* decision in Lisa Lee Mines v. Director, OWCP, supra, in which the Court interpreted 20 C.F.R. § 725.309(d). In Lisa Lee Mines, the Court reasoned that once a black lung decision has become final, it must be presumed to be correct. As stated by the Court,

> The 1986 denial is final, and for present purposes we must assume that it was correct . . . .
>
> If the 1986 denial is "final" in a legal sense, we must accept the correctness of its legal conclusion – Rutter was not eligible for benefits at that time – and that determination is as off-limits to criticism by the respondent as by the claimant. Only by repudiating the 1986 judgment and its necessary factual underpinning can no change in Rutter's condition be found. We believe that such repudiation is improper.
>
> Accepting the correctness of a final judgment is more than legalistic tunnel vision; it is a practical – perhaps the only practical – way to discern a concrete form in the mists of the past . . . The final decision of the ALJ (or the BRB or claims examiner) on the spot is the best evidence of the truth at that time.

Lisa Lee Mines, 86 F.3d at 1361; *See* Williams, 453 F.3d at 615; Pet. App. 13a. The panel then reasoned that the principles of finality contained in Lisa Lee Mines apply in the context of a medical opinion that triggers the statute of limitations:

> For this reason, the DOL's legal determination that Williams was not totally disabled due to coal worker's pneumoconiosis as of January 11, 1996 necessarily refuted Dr. Lebovitz's diagnosis that Williams had contracted the disease by that point. Moreover, because we must treat Dr. Lebovitz's diagnosis, for legal purposes, as a misdiagnosis in light of the denial of Williams's first claim, we must similarly conclude that the (mis)diagnosis had no effect on the statute of limitations for his second claim.

Id., 453 at 616. Pet. App. at 14a.

This interpretation of 20 C.F.R. § 725.308 was strongly advocated by the Director in litigation before the Fourth, Sixth and Tenth Circuits. Indeed, when the Department of Labor was promulgating revisions to the regulation on duplicate claims, 20 C.F.R. § 725.309, in the preamble it relied heavily on the Fourth Circuit's decision in Lisa Lee Mines. *See* 65 Fed. Reg. at 79968. Deference should be accorded to the Department of Labor's consistent and reasonable interpretation of the statute. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991); Mullins Coal Co. v. Director, OWCP, 484 U.S. at 159; Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Second, Consolidation Coal has itself re-written the statute. As applied to filing a claim after a medical determination, the black lung statute of limitations provides that "[a]ny claim for benefits . . . shall be filed within three years after . . . . a medical determination of total disability due to pneumoconiosis". 30 U.S.C. § 932(f). Read literally, the plain meaning of this statute is that "any claim" may be filed within three years from "a" medical determination of

total disability due to pneumoconiosis. Thus, each separate medical determination of total disability due to pneumoconiosis that a miner receives would trigger its own three-year limitations period for filing a new claim. The result of this literal interpretation of the statute's words would be quite broad, because it would allow a miner to restart the limitations period simply by obtaining a new medical determination of total disability due to pneumoconiosis. However, this is the "plain meaning" of the statute.

The Sixth Circuit was correct in stating in Peabody Coal Company that "[t]he term 'medical determination' is not defined in the statute." 48 Fed. Appx. at 145. Thus, the term "medical determination" must be interpreted. The interpretation propounded by the Fourth, Sixth and Tenth Circuits, and by the Director, is reasonable, taking into consideration both the latent and progressive nature of pneumoconiosis and concern for the fact that a premature misdiagnosis of pneumoconiosis could permanently doom a miner's worthy claim for black lung benefits. The interpretation advocated by the petitioner, on the other hand, is not actually the plain meaning of the statute, is unsupported by any authority, and would serve to unnecessarily deny meritorious black lung claims.

Third, petitioner's argument is logically incoherent in stressing that Mr. Williams did not submit the report of Dr. Lebovitz to the Department of Labor while his first claim was pending. Pet. at 8 n. 3, 13. Indeed, Consolidation Coal moralistically suggests that this fact is a reason why Mr. Williams' second black lung claim was filed untimely:

> The panel's decision excuses Mr. Williams' purposeful choice to withhold Dr. Lebovitz's report and impose no consequences on him for withholding

> that information despite his being informed he was totally disabled as a result of pneumoconiosis by a physician. Pet. at 13.

However, under the petitioner's interpretation of the statute, it would not matter at all whether Mr. Williams ever submitted the report of Dr. Lebovitz to the Department of Labor. Petitioner asserts that once Mr. Williams received Dr. Lebovitz's opinion, he had three years from that date within which to file his claim. It does not matter whether the opinion of Dr. Lebovitz was a misdiagnosis or whether the opinion was based on any documentation or reasoning.[3] Nor should it matter under the petitioner's interpretation of the statute what Mr. Williams did with Dr. Lebovitz's opinion. The only reason for Consolidation Coal to stress the fact that Mr. Williams did not submit Dr. Lebovitz's opinion to the Department of Labor is to attempt to place Mr. Williams in a bad light. Petitioner's reliance on this fact shows the weakness of its argument.

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[3] The administrative law judge found that Dr. Lebovitz's opinion was unreasoned and undocumented, and would almost certainly not have changed the Department of Labor's disposition of the claim.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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